VOLENTI NON FIT INJURIA IN ACTIONS OF NEGLIGENCE.

PROPER RELATIONS OF THE DOCTRINE.

IN the well-known words of Baron Alderson,[1] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,"—"provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care," is the necessary qualification made by Pollock.[2]

Smith defines negligence as being "a breach of duty unintentional, and proximately producing injury to another possessing equal rights."[3]

Beven says, "Negligence is the failure to bestow the care and skill which the situation demands."[4]

Each of these definitions falls back upon some "duty" as the ultimate test, and no one is complete until further explanation is given as to what gives rise to the duty. The principle laid down by Brett, M. R.,[5] is probably the best general expression of the foundation of duty: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause[6] danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."[7]

There is no such thing, then, as negligence in the abstract, but the terms "negligence" and "duty" are correlative. Whenever neg-

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1 Blyth *v.* Birmingham Water Works Co., 11 Exch. 784 (1856).

2 Pollock on Torts, p. 354.

3 Smith on Negligence, p. 6.

4 Beven on Negligence, p. 345.

5 Heaven *v.* Pender, 11 Q. B. D. 508 (1883).

6 Should not this be amended, "he would reasonably and probably cause"?

7 It should be noticed that this proposition may be somewhat too wide. This duty cannot be applied to persons in the natural user of their land. Cf. Clerk and Lindsell on Torts, p. 361.

ligence is charged the test is what duty there was on the part of the person charged towards the special person complaining, and what was its extent at the time and under the particular circumstances. The duty imposed upon a man to exercise care towards another must vary according to the character of the danger, whether hidden or obvious, great or small, and according to the relation between the two men.[1] The same act may be negligent as against one man, and not as against another. In a given suit, therefore, for negligence, the defendant's duty to the plaintiff at the particular time of the injury is the sole thing to be considered, and not his general duty to others.[2]

The plaintiff in an action of tort for negligence must allege and prove a duty on the part of the defendant towards him, and a failure to perform. This proves the negligence. To show that it was actionable, he must go farther, and show that this failure was the proximate cause of the injury.

The defendant in such action has two distinct defences: —

I. To deny that his act caused the damage at all, although admitting the duty, (*a*) because of an intervening act of some one, or an intervening effect of something, breaking the causal connection between the defendant's act and the injury; (*b*) because of some act of the plaintiff's himself occurring simultaneously or subsequently to the defendant's act, breaking the causal connection and rendering the defendant's act no longer the *sole* proximate cause of the injury.

II. To admit that his act caused the damage, but to deny the duty, (*a*) because no duty was imposed by law upon persons standing in the relative positions of the parties, — as, for instance, where the plaintiff is a trespasser, or, where he is not such a person as the defendant was bound to anticipate would be likely to incur the danger; (*b*) because the plaintiff himself had voluntarily placed himself in such a position that no duty arose as towards him.

Now, these two defences are entirely distinct, the first admitting the negligence and denying the proximate cause, the second denying absolutely the negligence, *i. e.* the breach of duty towards the particular plaintiff. The first is a defence to the action; the second is really proof of no basis to a right of action.

The first of these defences (I. *b*) is that usually called contribu-

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[1] Cf. Lord Bowen in Thomas *v.* Quartermaine, 18 Q. B. D. (1886).

[2] Fitzgerald *v.* Conn. River R. R., 155 Mass. 156 (1891).

tory negligence, and is expressed by the formula: "If the plaintiff by the use of due care could have avoided the consequences of the defendant's negligence, the defendant is not liable." This is on the ground that the defendant's negligent act was not the real proximate cause, or, at least in cases of concurrent negligent acts, was not the sole cause. The second of the above defences (II. *b*) is that expressed by the maxim, "Volenti non fit injuria;" and, as said above, it is strictly not a defence, but a rule of law regarding a plaintiff's conduct which forms a bar to a suit brought by him based on another's alleged negligence. One who knows of a danger arising from the act or omission of another, and understands the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure.[1] In other words, towards a person fully cognizant and appreciative of the danger and risk to which the defendant's conduct exposes him, the defendant has no duty of taking care, and therefore is not negligent. It is often said that the two defences above stated, the two principles, are identical; and throughout the cases there is the greatest confusion between them.[2] This confusion arises from the fact that in many States contributory negligence is not treated as a defence, but rather as a bar to the plaintiff's case, which he himself must remove before being able to maintain his action. Treating the defence in this way naturally breaks down the line between contributory negligence and *Volenti non fit.* Thus, in Massachusetts[3] and other States it is held that the plaintiff does not show the existence of a duty towards him until he first shows that he himself was in the exercise of due care. "In this view, the absence of contributory negligence becomes a part of the plaintiff's case, and should appear *prima facie* before the defendant can be called on to answer the negligence imputed to him." It is submitted, however, that this is not the true view, and that after the plaintiff has given evidence of circumstances and relations creating a duty, and a breach of that duty, this should establish a *prima facie* case for him, to which the defendant should answer. Of course the burden will always be on

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[1] Fitzgerald *v.* Conn. River R. R., 155 Mass. 156 (1891).

[2] Cf. Smith on Negligence, p. 159.

[3] Cf. Cooley on Torts, p. 810; among the State courts following this rule are those of Illinois, Michigan, New York, Maine, Vermont, New Jersey, Connecticut; while the true view of contributory negligence is held by the courts of England, U. S. Supreme Court, Minnesota, Wiconsin, Missouri, Pennsylvania, California.

the plaintiff to prove due care on his part, because evidence of a want of due care goes directly to disprove one essential of the plaintiff's case, *i. e.* the proximate causality of the defendant's act.

That the two defences above stated are dissimilar and distinct[1] will be seen on examination. Due care is taking the precautions which an ordinary reasonable, prudent man would take under the circumstances. Now, there are many undertakings attended with more or less peril which such a man in the exercise of prudence may enter upon, and does enter upon, every day. In such a case the defendant cannot say, "You are guilty of want of care in exposing yourself to the danger. You are guilty of contributory negligence." There is no negligence in the entering upon the act, it being an act often undertaken, though dangerous, by reasonable and prudent men. What the defendant can say is, however, "You may have been as careful as the most careful man; you may have done a thing that many prudent men do, but you have exposed yourself, with full knowledge and of your own accord, to a danger which I have brought about. You have hence shown that you agree to take your chances of the danger. I admit that this was not careless of you. But you did assume the risk. I therefore had no duty[2] towards you, and you have no action against me." Furthermore, a man, having entered upon a dangerous undertaking with eyes fully open to the danger, may use all the care in the world.[3] In fact, the very danger may make him even more than usually careful. In such a case contributory negligence cannot be predicated of him. The question is a larger one. "Has he voluntarily assumed the risk of the danger?" As Wharton says,[4] "Negligence necessarily excludes a condition of mind which is capable either of designing an injury to another or agreeing that an injury should be received from another. To contributory negligence, therefore, the maxim *Volenti non fit injuria*, does not apply, because a negligent person exercises *no will at all*."[5] It is evi-

[1] Importance of distinction is pointed out in Erle's summing up to the jury in Indermaur *v.* Dames, L. R. 1 C. P. p. 277.

[2] Some judges, like Esher, M. R., in Yarmouth *v.* France, 19 Q. B. D. p. 653 (1887), prefer not to say that the defendant owed the plaintiff no *duty*, but that "though he owed him a duty, the breach of this duty gives no right of action, that it is what is called a duty of imperfect obligation." This would seem to be a mere juggling with words.

[3] Mimer *v.* Conn. River R. R., 153 Mass. 402 (1891).

[4] Wharton on Negligence, § 132.

[5] How badly confused the two defences may be can be seen from this extract from an otherwise admirable opinion on the subject: "It may be said that the voluntary

dent, therefore, that when the case of a plaintiff exposing himself to a known danger is given to the jury, the first question for them is not one of due care. "It may be consistent with due care to incur a known danger voluntarily and deliberately." The jury should be charged that, before investigating whether he was careless or not, they should decide whether he had consented by his action to run the chances of a fully appreciated danger voluntarily. If this is decided affirmatively there is no further need of a decision upon the plaintiff's care or want of care. If the jury finds, however, that the danger was not fully appreciated, or not undertaken voluntarily, then they should be charged to consider whether the plaintiff, in the exercise of due care, should or could have avoided the danger. In other words, a plaintiff is debarred from showing a want of contributory negligence in himself, until he first proves that he has not voluntarily run the risk.[1]

Of course where an absolute liability is created by statute, and an action given thereby for neglect, as in the cases under the statute liability of towns and cities for defective highways, then the primary question for the jury is one of negligence on the part of the plaintiff, because the duty and liability on the part of the defendant are already created. It is submitted that this fact has not been duly regarded, and a confusion has been introduced through the citation by the courts of cases of this nature upon the subject of *Volenti*.[2]

Development of the Doctrine.

Originally, as borrowed from the old civil law, the maxim meant a defence arising from a specific assent by the party injured to a particular act, which, if done without such assent, would be a legal wrong. The scope of the defence as applied in actions for negli-

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conduct of the plaintiff in exposing himself to a known and appreciated risk, is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury." Fitzgerald *v.* Conn. River R. R., 155 Mass. 156 (1891). This really is a correct statement of the true rule of contributory negligence. It is not a statement of the rule of "volenti," as laid down in the English, and most of the other Massachusetts cases.

[1] Cf. Buswell on Personal Injuries, § 210. It is submitted that the case of Dewire *v.* Bailey, 131 Mass. 171, holding that the fact of a person entering a building with knowledge of dangerous ice on sidewalk, is not evidence conclusive of want of due care, is wrong, as not submitting first to the jury the question of assumption of risk.

[2] Cf. Wilson *v.* Charlestown, 8 Allen, 137 (1864); West *v.* Lynn, 110 Mass. 519 (1872); Dewire *v.* Bailey, 131 Mass. 169 (1881).

gence has been extended to conduct showing a willingness to take the chances of the defendant's action, and to run the risk, *i. e.* a general assent to a condition which may or may not give rise to the particular injury. It is sometimes said that the defence, being but a maxim, must not be arbitrarily and fixedly applied. But as Lord Bramwell said in Smith *v.* Baker,[1] "If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule;" and Lord Herschell, in the same case,[2] "The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him, cannot, when he suffers from it, complain of it as a wrong."

The defence, although well recognized in general terms throughout actions for negligence, has been expressly applied by name in very few cases until in recent years.

In actions of negligence, it first prominently appeared in the famous spring-gun case of Ilott *v.* Wilkes[3] (1820), where, in case of one trespassing in a wood, with notice of spring-guns set there, and being injured, Bayley, J., held, "The maxim *Volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened. . . . He does it at his own peril, and must take the consequences of his own act." In Skipp *v.* Eastern Counties Ry. Co.[4] (1853), it was the plaintiff's duty to attach the carriages; there was evidence of danger, and that the company did not provide enough servants for the safe performance of the work. The plaintiff had been employed several months. Martin, B., held that the plaintiff had "brought the accident upon himself." Platt, B., said, "The case falls within the principle *Volenti non fit.*" Martin, B., "I considered the plaintiff as a voluntary agent." In Senior *v.* Ward[5] (1859), the plaintiff was injured by a defective rope which by rule should have been tested by his employer, but which he knew had not been so tested, and which he was warned by the bankman to test for himself. Campbell, C. J., held, "The negligence of the plaintiff, which materially contributed to the accident, would, upon well-established principles, have deprived him of any remedy, — *Volenti non fit injuria.*" In this case we meet with the confusion of ideas between the two defences of

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[1] Smith *v.* Baker, 1891, App. Cas. 325, p. 344. [2] Idem, p. 360.

[3] Ilott *v.* Wilkes, 3 B. & Ald., p. 311 (1820).

[4] Skipp *v.* Eastern Counties Ry., 9 Exch. 223 (1853); Assop *v.* Yates, 2 H. & N. 768 (1858). See also Dynen *v.* Leach, 26 L. J. Exch. 221.

[5] Senior *v.* Ward, 1 E. & E. 385 (1859).

contributory negligence and *Volenti non fit*, which has continued throughout all the cases on employers' liability [cf. *infra*].

In Britton *v.* Great Western Cotton Co.[1] (1872), it was held the plaintiff must have full knowledge and understanding of the *nature* of the risk to which he was exposed. The defence was carefully discussed in an *obiter* of Lord Bramwell's in Lax *v.* Darlington[2] (1879). Here one of the plaintiffs' cows had met with an accident similar to the one in question some time before, and the plaintiffs chose to go to the spot with a knowledge of the danger. Lord Bramwell held that if the question had been before him he should "have had very great misgivings as to whether the plaintiffs were entitled to recover, because if they knew the amount of the danger and chose to risk it, it is their own fault. They are volunteers." He continues: "If a person choose to go out with an obvious danger before him he must take the consequence."

In Woodley *v.* Met. Dist. Ry. Co.[3] (1877), it was held that if a man, not the servant of the Railway Company, but of a contractor, undertakes to do work in a tunnel where he knows trains are constantly passing, he cannot complain that the railway did not warn persons of approaching trains, and by Cockburn, C. J., that the defendant was not at fault and owed no duty to the plaintiff. "If a man for the sake of the employment takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."[4]

It was not until after the passage of the Employers' Liability Act in England, in 1880, that the defence received its most careful consideration. As the courts held, or at least strongly intimated, that that Act took away from an employer the old defence of employee's risk, *i. e.*, that the employee assumed the obvious incidental risks of his employment, the defendants in accident cases began to urge as a defence what was really a broader application of the same doctrine. In Thomas *v.* Quartermaine[5] (1887), it was held by Lord Bowen (1) that in finding plaintiff not guilty of con-

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[1] Britton *v.* Great Western Cotton Co., L. R. 7 Exch. 130 (1872), and see Clarke *v.* Holmes, Byles, J., 7 H. & N. 937 (1862).

[2] Lax *v.* Corp. of Darlington, L. R. 5 Exch. 33 (1879). See note by Lord Bramwell in Appendix of Smith on Negligence, 2d ed., and Clayards *v.* Dethick, 12 Q. B. 439 (1848).

[3] Woodley *v.* Met. Dist. Ry. Co., 2 Exch. Div. 384.

[4] And see Griffiths *v.* London & St. Katharine Docks Co., L. R. 12 Q. B. D. 493 (1884); L. R. 13 Q B. D. 259.

[5] Thomas *v.* Quartermaine, 17 Q. B. D. 414 (1886), and 18 Q. B. D. 645.

tributory negligence the county judge left untouched the defence of *Volenti non fit;* (2) that *Volenti* was not equivalent to *scienti;* there must not only be "knowledge and perception of the danger," but also "comprehension of the risk;" (3) that when it is knowledge under circumstances that leave no inference open but one, viz. that the risk has been voluntarily encountered, the defence is complete; (4) that if the facts are undisputed it is a question of law which the court may decide, whether the risk has been voluntarily assumed; (5) that the defence *Volenti* was not taken away by the Employers' Liability Act. This case has been severely criticised by Esher, M. R., in Yarmouth *v.* France [1] (1887), and by Lord Herschell and Lord Watson, in Smith *v.* Baker,[2] on the ground that the fact of *volenti* cannot be held as a matter of law. But the case has never been overruled.

In Membery *v.* G. W. Ry. Co.[3] (1889, H. of L.), the plaintiff had for seven years worked at shunting of trucks, with knowledge of its danger if performed without assistance. Having asked for a boy to help him and being refused, he proceeded to shunt trucks alone. *Held,* defendant owed him no duty. Lord Herschell and Lord Halsbury agreed that the limits of the maxim must be left open for future decision.

In Smith *v.* Baker (1891), the plaintiff was employed by railway contractors to drill holes near a crane worked by other men employed by the contractors. The crane swung stones over the plaintiff's head, and the plaintiff was aware of this, and of the danger. The only point really decided was that under the circumstances of the case the question whether he had undertaken the risk was one of fact and not one of law. This was put upon various grounds by the different judges, and no definite conclusion as to the scope [4] of the maxim was reached.

The doctrine as established is composed of two parts; first, that plaintiff shall have full knowledge of the nature and extent of the risk; second, that he shall freely and voluntarily incur it. The necessity of the first requisite is pointed out in Osborne *v.* London, & N. W. Ry. Co.[5] (1888), where the plaintiff admitted that he knew

[1] Yarmouth *v.* France, 19 Q. B. D. 649 (1887).

[2] Smith *v.* Baker (1891), App. Cas. 325 (H. of L.). But see Church *v.* Appleby, 5 Times Law Rep. 88 (1888).

[3] Membrey *v.* Great Western Ry. Co., 14 App. Cas. 179 (1889). Cf. note in Law Quarterly Rev., v. 445.

[4] Cf. Article on Law Quarterly Rev., viii. 202.

[5] Osborne *v.* London & N. W. Ry. Co., 21 Q. B. D. 224 (1888).

that the icy steps down which he went were dangerous, and that he went down carefully, holding the handrail. The jury found specifically no contributory negligence. Wills, J., held that the defence *Volenti* was not proved, as "the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow." This requisite of the defence, as the judge pointed out, "goes far to make it hard for a defendant to succeed, . . . for it is probable that juries would often find for the plaintiffs on the ground that they had not full knowledge of the nature and extent of the risks."

The chief discussion has come upon the second part of the maxim, *i. e.* what is the meaning of the word "voluntarily"? When does a man voluntarily incur a danger? In Thrussel *v.* Handyside[1] (1888), where plaintiff was a carpenter, and defendant's workmen on roof above him dropped bolts, of which the plaintiff had complained before his injury, it was held that knowledge of the danger was not proof of his wilfully incurring it, and that as he was lawfully engaged on work and in danger of dismissal if he left it, the defendants were bound to use due care. It should be noticed that in this case there was no relation of any kind between plaintiff and defendant except that of location.[2]

It was suggested by Lindley, L. J., in Yarmouth *v.* France (1887), that the fact that a plaintiff protests against a danger, but goes on as before, is not conclusive of his assumption of it. "Fear of dismissal rather than voluntary action might properly be inferred." The opposing view is put forward by Lord Bramwell,[3] who says, "Are we to say, *Volenti fit injuria*, provided the plaintiff grumbles?" "Where a man can at his option do a thing or not, and he does it, the maxim applies;" and this is the view held in the Massachusetts courts.[4]

The law as to this point is then as yet unfixed, although there were intimations by Lord Herschell and other judges, in Smith *v.* Baker, that where a risk has been enhanced by breach of duty of the employer, a mere continuance in the service with knowledge would not debar an employee's recovery. But these opinions

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[1] Thrussel *v.* Handyside, 2 Q. B. D. 359 (1888). Cf. esp. note in Law Quarterly Rev., iv. 239.

[2] See discussion of this case at end of this article.

[3] Membery *v.* G. W. Ry.

[4] Leary *v.* B. & A. R. R., 139 Mass., p. 587.

ignore the fact that the whole question turns on just that point, whether there *is* any "breach of duty" towards any employee in such a position.

There has been some discussion, confined, however, to the English cases, as to how far a statutory duty [1] to guard machinery, or against danger, took away from a defendant the defence of *Volenti*.

The result of the cases seems to be that a statutory duty is not of such a nature that in no event can it be waived by conduct on the plaintiff's part. It simply places upon the defendant the burden of proving not only knowledge, but that as a matter of fact the servant has dispensed with the performance of the master's statutory duty.[2]

The doctrine of *Volenti* has been chiefly of importance in its application under the restricted form known as Employee's Risk.[3] The rule that an employee impliedly contracts to assume the obvious and incidental risks of his employment was laid down by Judge Shaw in 1842.[4] The reasons for the implication of such a contract have generally been held to be, (1) that an employee's compensation is regulated according to the risks; [5] (2) that it is public policy, the absence of remedy making the workman more careful; (3) that the servant is as likely to know and to be able to guard against the perils as the master.

As to (1), students of political economy know that as a matter of fact wages of a particular workman are not regulated in this way. As to (2), unless it is careless in a workman to try to obtain employment which may involve risk, it is hard to see why public policy demands that he should have no remedy in case of injury.[6]

The third reason would seem to be the true one; but there is no need of alleging an implied contractual agreement to waive

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[1] Note, this does not refer to a statutory *liability* in action for negligence, as discussed *supra*.

[2] Clark *v.* Holmes, 7 H. & N. 937; (1862); Britton *v.* G. W. Cotton Co., L. R. 7 Ex. 136, and esp. 41 L. J. Ex. 101; Beven on Negligence, §§ 348, 349. The case of Baddeley *v.* Earl Granville, 19 Q. B. D. 433, discussing this defence, is ill considered and a wrong statement of the law. See article in Law Mag., November, 1887.

[3] Cf. Mahoney *v.* Dore, 155 Mass. p. 518 (1892).

[4] Farwell *v.* B. & W. R. R., 4 Metc. p. 57 (1842); Hutchinson *v.* York, N. & B. Ry. 5 Exch. 351 (1850); Seymour *v.* Maddox, 16 Q. B. 332 (1851); Bartonshiel Coal Co. *v.* Reid, 3 Macq. [H. of L.] 277 (1856).

[5] Cf. esp. Chicago R. R. *v.* Rose, 112 U. S. 382 (1884).

[6] Cf. State *v.* Nain, 2 Dev. Law. 263, where it is said that the law denied any civil remedy to slaves out of humane regard to the best interests of the slaves.

compensation. A mere duty to look out for one's self or another cannot and should not always be turned into a contract to do so.[1]

There are really three distinct branches of the defence of Employee's Risk which have never been clearly separated by the courts, and the three lines of cases have been treated as if they all came under the principle of implied contract: (1) Cases where the plaintiff is injured by a machine or condition purely incident to the work when he enters upon it; (2) cases where the danger or defect is not incident but actually known by the plaintiff at the time of entry; (3) cases where the machine or condition becomes dangerous or defective subsequent to his entry, but where he continues to work with knowledge.

The first line of cases is the only one to which strictly Judge Shaw's doctrine is applicable. The other two lines come under a far more general doctrine and should never have been decided under a rule peculiar to the relation of master and servant.

As to the first branch, in order that an employer may maintain the defence of implied assumption of the risk, it is laid down by the courts that (1) the risk must be incident to the employment.[2] (2) It is not enough that the peril be incident, unless it so obviously incident that the plaintiff knows it, or from its character and circumstances will be presumed or ought to know it.[3] (3) Plaintiff must not only know but also appreciate the extent of the risk and danger; (4) the question of the plaintiff's negligence is not at

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[1] Riley *v.* Baxendale, 6 H. & N. 445 (1861). Wilde, J.: "It does not follow that wherever a duty is cast upon a person, the law will imply a contract on his part to perform it."

[2] Structure near R. R. track one of the dangers of the business, Lovejoy *v.* B. & L. R. R., 125 Mass. 82 (1878); Fisk *v.* Fitchburg R. R., 158 Mass. 239 (1893). Broken cars, Yeaton *v.* B. & L. R. R., 135 Mass. 418 (1883). Location of tracks and switches, Wood *v.* Locke, 147 Mass. 605 (1888); Coombs *v.* Fitchburg R. R., 156 Mass. 200 (1892); Tuttle *v.* Milwaukee R. R., 122 U. S. 194 (1886). Slipperiness of floor, Murphy *v.* American Rubber Co., 159 Mass. 267 (1893); Wilson *v.* Tremont Mills, 159 Mass. 155; Kleinest *v.* Kunhardt, 160 Mass. 231 (1893). Darkness of passage-way, Murphy *v.* Greely, 146 Mass. 200 (1888). Dangers on shipboard, Williams *v.* Churchill, 137 Mass. 294 (1884); Anderson *v.* Clark, 155 Mass. 370 (1892).

[3] Goldthwaite *v.* Haverhill R'y Co., 160 Mass. 555 (1893): Connors *v.* Morton, id. 335; Scanlon *v.* B. & A. R. R., 147 Mass. 487 (1888): "The risk of safety of machinery is not assumed by the employee unless he knows of the danger, or unless it is so obvious that he will be presumed to know it," Myers *v.* Hudson Iron Co., 150 Mass. p. 134 (1889): "or which by exercise of ordinary care he ought to know to be incident to the nature of the business in the place where and the manner in which it is carried on." Wheeler & Wilson Mfg. Co., 135 Mass. 293 (1883). Cf. O'Maley *v.* Boston Gas Co, 158 Mass. 138, and Ladd *v.* New Bedford R. R., 113 Mass. 413 (1876).

issue [1] until it is first decided whether he has impliedly assumed the risk. In short, a master owes no duty to take care and is guilty of no negligence towards a servant who either actually or presumptively knows, or ought to know, the danger to which he will be exposed. Such a doctrine, however, is not peculiar to servants. If the plaintiff knows the danger, then the defence is purely *Volenti non fit.* If the danger is so obviously incident that he ought to know, and if he chooses to enter upon the work without ascertaining the extent of the risk,[2] then the defence is the same absence of duty to warn against obvious dangers that exists in the case of any occupier of premises towards one entering upon them.

Now, while a servant is held impliedly to contract to accept risks incident, the courts also hold that he does not thereby necessarily assume the risk of all unsafe and dangerous machinery.[3] A master owes a duty towards his servant to supply reasonably safe machinery, so as not to expose him to unnecessary risks,[4] and a breach of this duty will give rise to an action against him, unless he has some defence in the special case. The defence usually set up is that treated by the courts as the second and third branches of the defence of Employee's Risk. In reality, however, it is not the defence of implied contract, but a more general one. When the danger or defect is not incident, but is contemporaneous with or subsequent to the servant's entry, the courts hold that in order that a plaintiff servant should be barred, (1) the servant must be capable of choosing, and of sufficient capacity to understand the risk.[5] (2) He must know the danger.[6] (3) He must not only know of the defect, but must appreciate the probability and

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[1] Joyce *v.* Worcester, 140 Mass. 248 (1885).

[2] Cf. O'Maley *v.* Boston Gas Light Co., 158 Mass. p. 138 (1893).

[3] Snow *v.* Housatonic R. R., 8 Allen, 445 (1864).

[4] Hutchinson *v.* York, N. & B. Ry, 5 Exch. 351 (1856); Bartonsheil Coal Co. *v.* McGuire, 3 Macq. 307 (1856), H. of L. "The law justifies a servant in assuming that proper and sufficient appliances will be furnished him;" . . . "an employee assumes the risk of such dangers as without the fault of the master naturally and ordinarily attend the employment." Buswell on Law of Personal Injuries, § 207: Hough *v.* R. R., 100 U. S. 217 (1879); Northern Pacific R. R. *v.* Herbert, 116 U. S. 647 (1885).

[5] Coombs *v.* New Bedford, 102 Mass. 572; Pingree *v.* Leland, 135 Mass. 401 (1883); Richstain *v.* Washington Mills, 157 Mass. 541 (1892).

[6] Russell *v.* Tileston, 140 Mass. 20 (1885); Gilbert *v.* Guild, 144 Mass. 604 (1887); Boyle *v.* N. Y. & N. E. R. R., 151 Mass. 103 (1890); Foley *v.* Pettee Machine Works, 151 Mass. 297; Rood *v.* Lawrence Mfg. Co., 155 Mass. 593 (1892); McCarthy *v.* Foster, 156 Mass. 514 (1892); Downey *v.* Sawyer, 157 Mass. 420 (1892): Patnode *v.* Warren Mills, 157 Mass. 284, giving review of cases; Washington R. R. Co. *v.* McDade, 133 U. S. 570 (1889).

extent of the risk and danger therefrom.[1] (4) The fact that the servant undertakes the work unwillingly, under fear of discharge, or by order of his superior officer, will not prevent the application of the defence.[2] (5) Where a servant employed on certain duties undertakes others outside of his own accord, or by order of his master, with knowledge of the danger, he cannot recover, provided he is not misled into a failure to appreciate the extent of the risk by his master's order.[3]

The requisites, as thus laid down, will be seen to be exactly the same as the defence of *Volenti*, as finally formulated in the English cases.[4]

In most of the States outside of Massachusetts much confusion has arisen[5] because of the indiscriminate use of the term "contributory negligence" in these branches of cases. The courts seem to hold that the test of whether the servant assumed the risk of a known defect is whether he was contributorily negligent in working at it, — whether he was using due care in so working.

[1] Lawless *v.* Conn. River R. R., 136 Mass. 3 (1883); Taylor *v.* Carew Mfg. Co., 140 Mass. 151 (1885); Ferren *v.* C. C. R. R., 143 Mass. 197 (1887); Keenan *v.* Edison Electric Co., 159 Mass. 382 (1893); Daigle *v.* Lawrence Mfg. Co., 159 Mass. 379.

[2] Haley *v.* Case, 142 Mass. 322 (1886); Lynch *v.* Sagamore Mfg. Co., 143 Mass. 210 (1887); Leary *v.* B. & M. R. R., 139 Mass. 584 (1885); Westcott *v.* N. Y. & N. E. R. R., 153 Mass. 461 (1891); R. R. Co. *v.* Fort, 17 Wall. 557 (1873). Note that a promise by the master to repair the defect in machinery upon which plaintiff continues to work with knowledge may, if the plaintiff relies upon, be taken into consideration by the jury in determining whether the risk is assumed. Counsel *v.* Hall, 148 Mass. 470 (1880). Cf. Lewis *v.* N. Y. & N. E. R. R., 153 Mass. 76 (1891); and Clark *v.* Holmes, 7 H. & N. 937 (1862); Buswell on Personal Injuries, § 212, and note in HARVARD LAW REVIEW, V. 37. The true reason would seem to be that the master is debarred from setting up the defence because his own action has led to the alleged assumption by the servant.

[3] Mellor *v.* Merchants Mfg. Co., 150 Mass. 362; Buswell on Personal Injuries, § 210.

[4] It would thus seem that the Massachusetts case of O'Maley *v.* Boston Gaslight Co., 158 Mass. 135 (1893), which held (seemingly *contra* to English cases), that the Employee's Liability Act did *not* do away with the defence of employee's risk, is of little practical effect.

[5] Cf. Buswell on Personal Injuries, §§ 207, 208, 230; Sherman and Redfield on negligence, § 208; Hough *v.* R. R., 100 U. S. 217 (1878); Kane *v.* Northern Central R. R., 128 U. S. 94 (1888); all taking the view that these cases are merely examples of contributory negligence. The Massachusetts cases have occasionally wobbled, and treated the cases purely from the point of due care in the plaintiff. See Probert *v.* Phipps, 149 Mass. 261 (1889); Lothrop *v.* Fitchburg R. R., 150 Mass. 429 (1890); Westcott *v.* N. Y. & N. E. R. R., 153 Mass. 461 (1891); Rood *v.* Lawrence Mfg. Co., 155 Mass. 293 (1892); Henry *v.* King Philip Mills, 155 Mass. 363. But for explanation of the true importance of the distinction between the two defences, see Taylor *v.* Carew Mfg. Co., 143 Mass. 472; 140 Mass. 101; Lawless *v.* Conn. River R. R., 136 Mass. 3 (1883); Huddleson *v.* Machine Shop, 106 Mass. 286 (1871); Hall *v.* Chenery, 159 Mass. 270 (1893).

The confusion arises largely (as pointed out *supra*) because of the anomalous doctrine laid down in Massachusetts and other States as to contributory negligence, and the consequent confusion between that defence and *Volenti non fit*. But, as shown before, it is evident that it is only after reviewing all the facts and deciding that the plaintiff cannot be fairly said to have assumed the risks, knowing and appreciating the danger, that a jury is warranted in inquiring whether he was in exercise of due care in working or in his work. For it may be perfectly consistent with the existence of due care to work on a dangerous machine, and the most prudent men constantly do so; and yet a man so doing may well be debarred from an action, if injured, on the ground of assumption.

To sum up: The duty which a master owes to his servant with regard to the care of his premises, or the machinery upon them, is practically identical with the duty which he owes to other persons who have gone upon his premises by invitation or for business.[1] "It is the duty of all occupiers of real property to which others have right to resort upon business with the occupier, to use due care that those so resorting are not exposed to hidden dangers of which he is, or ought to be, aware, and of which they are ignorant, provided he has no good reason to presume that they have equal knowledge on the subject with himself." To this, in the case of servants, may be added the presumption that the servant knows the ordinary incidents of the business on which he engages when he enters the property of the master. As a foundation for showing no duty on his part, then, the master, like any occupier of premises, has only to show knowledge express or implied on the part of the servant. The defence *Volenti* then may arise.

Limits of the Doctrine.

It is evident that there must be some limit in actions of negligence to the defence. It cannot be that wherever a plaintiff knows there is *some* risk he debars himself from any right to complain if injury happens to him.[2] A person does not necessarily assume the risk of the defendant's *negligent* action, even if he knows of it. Thus, if A. knows that B. drives his cab carelessly, and that he has run down many persons, A. does not necessarily

[1] Cf. Bigelow on Torts, p. 328; Story on Agency, 9th ed., § 453 d, note 1.

[2] As Lord Halsbury, in Smith *v.* Baker, says, p. 337: If this were so, "no person ought to have been awarded damages for being run down in London streets. . . . No person could have crossed London streets without knowing there was a risk of being run over."

voluntarily assume the risk of being knocked down, by simply crossing a street in which he knows B. to be driving. It is submitted that the application of the maxim or defence must be limited to those cases where the plaintiff and defendant enter into some distinct relation towards each other, such as employer and employee, occupier of land and person entering upon the land, contractor and contractee, railroad and passenger, seller of article and person purchasing or likely to purchase or use. But where plaintiff and defendant are simply the members of the same general community, occupying no specific relation to each other, then each is bound to use ordinary care towards the other, and the fact that the plaintiff knows that the defendant negligently does something which may bring him injury, is not conclusive that the plaintiff has assumed the risk of the danger from that negligence. In other words, it is only when a plaintiff has a choice whether he will enter into a specific relation to the defendant that the maxim will apply, if he chooses to enter or continues in that relation with knowledge of the danger. Where the relation between plaintiff and defendant is forced upon the plaintiff by the defendant's action, then if the plaintiff is hurt, even with knowledge of the danger, it does not lie in the defendant's mouth to say, "Yes, but you assumed the risk of my misconduct." The plaintiff may well say, "It was not my choice. The danger and risk of making the choice was forced upon me by your action."

This, it is submitted, is the true explanation of cases like Thrussel *v.* Handyside.[1] In that case, there being no connection between the plaintiff and defendant except that the plaintiff happened to be working underneath the defendant's servants, the fact that the plaintiff knew his position to be dangerous did not absolve the defendant from using due care to prevent injury, because neither party of his own choice had entered into any relation with the other, except that they happened to be working near each other. One party cannot force himself into such a relation with the other so as to allow him to say to the other, who is thus obliged to accept the relation, "If you stay in this position with knowledge, I owe you no duty." Both have equal rights to be where they are, and between them the defence of *Volenti non fit injuria* has no place.

Charles Warren.

[1] Thrussel *v.* Handyside, 20 Q. B. D. 359 (1888). See note in Law Quarterly Review, IV. 239, and, for an example of this class of cases, cf. Mahoney *v.* Met. R. R., 104 Mass. 73 (1870), and cf. an erroneous failure to distinguish it from cases of direct assumption of risk, in Dewire *v.* Bailey, 131 Mass. 171 (1881).